KERAJAAN MALAYSIA v. TASJA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[ORIGINATING SUMMONS NO: WA-24C(ARB)-2-01-2016]
30 MAY 2016

ARBITRATION: *Award – Interest – Whether arbitrator has discretion to award pre-award interest – Whether arbitrator erred in awarding pre-award interest – Far East Holdings Bhd v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang – Applicability – Arbitration Act 2005, s. 33(6)*

The plaintiff, by a written contract, appointed the defendant to construct and complete a project for a total contract sum of RM49,990,000. A certificate of practical completion was issued by the plaintiff which certified that the whole of the works were satisfactorily completed. However, a dispute arose between the parties concerning the defendant's claim against the plaintiff for payment of works done relating to the subsequent topping up of surcharge carried out during the agreed surcharge period and removal upon completion. The dispute was referred to arbitration and after a full hearing, the arbitrator found in favour of the defendant. The arbitrator, *inter alia*, ordered that the plaintiff pay the defendant pre-trial interest on the principal sum awarded to the plaintiff. The plaintiff, in the circumstances, filed an application pursuant to s. 42 of the Arbitration Act 2005 ('Act') referring to the question of law of whether the arbitrator erred in law in deciding that an arbitrator had jurisdiction in granting pre-trial interest. It was the plaintiff's contention that the present court was bound by the decision of the Court of Appeal in *Far East Holdings Bhd v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang* ('*Far East*') which held that pursuant to s. 33(6) of the Act, the arbitrator did not have the power to grant pre-award interest. The defendant on the contrary contested the plaintiff's application on the grounds, *inter alia*, that (i) the case of *Far East* was distinguishable because the Court of Appeal's decision on the absence of pleading on the point of pre-award interest was merely *obiter dictum* and not binding.

Held (setting aside award of pre-award interest):

(1) Section 33(6) of the Act makes specific provision for post-award interest, but does not provide for pre-award interest. Clearly, the Act does not contemplate the awarding of pre-award interest. When the Act specifically provides for post-award interest but is silent on pre-award interest, then implicitly the Legislature does not intend to confer on an arbitrator the power to award pre-award interest. (para 33)

(2) The basis for the Court of Appeal in the case of *Far East* in holding that the arbitrator ought not to have awarded pre-award interest stems from a lack of power of the arbitrator to do so in law, it would be difficult

A if not impossible to argue that the said decision was a mere *obiter dicta*. It was very much the *ratio* of the case where the pre-award interest was concerned, being the answer to a specific question raised in a reference under s. 42 of the Arbitration Act 2005 which substantially affected the rights of the parties to the arbitration. (para 47)

B **(3)** It was decided in the case of *Far East* that an arbitrator lacks the power and the jurisdiction to grant pre-award interest. It was a pronouncement of the law that goes to the very root and core of the arbitrator's powers. Further, the plaintiff merely made a bare denial on the claim for interests. It is well-established that the danger of this kind of general C denial defence is that once the plaintiff takes that course, it must stand or fall on its pleaded defence. It was not permissible for the plaintiff to proceed to put forward some affirmative case which they had not pleaded or alleged. (paras 64 & 66)

Case(s) referred to:

D *Ahong Construction (S) Pte Ltd v. United Boulevard Pte Ltd [1995] 1 SLR 548* ***(refd)***
AR PL Palaniappa Chettiar v. Lakshamanan Chettiar [1983] 1 LNS 178 PC ***(refd)***
Bishop v. Bonham [1988] 1 WLR 742 ***(refd)***
Chain Cycle Sdn Bhd v. Kerajaan Malaysia [2016] 1 CLJ 218 CA ***(refd)***
Chandris v. Isbrandtsen-Moller Co Inc [1950] 2 All ER 618 ***(refd)***
Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd [2004] E *1 CLJ 357 CA* ***(refd)***
Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. NC Budharaj [2001] 2 SCC 721 ***(refd)***
Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Another Appeal [2015] 8 CLJ 58 CA ***(foll)***
Fidelitas Shipping Co, Ltd v. V/O Exportchleb [1965] 2 All ER 4 ***(refd)***
F *Government Insurance Office of NSW v. Atkinson-Leighton Joint Venture (1981) 146 CLR 206* ***(refd)***
IBM Australia Ltd v. National Distribution Services Ltd (1991) 100 ALR 361 ***(refd)***
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors [1997] 3 CLJ 274 SC ***(refd)***
G *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA* ***(refd)***
Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd [1994] 3 CLJ 338 HC ***(refd)***
Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corporation & Anor [2013] 5 CLJ 425 FC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 3 CLJ 520 CA ***(refd)***
H *Malayan Banking Bhd v. Chairman Sarawak Housing Developers' Association [2014] 6 CLJ 409 FC* ***(refd)***
Nassif v. Caminer [2009] NSWCA 45 ***(refd)***
Ong Thye Peng v. Loo Choo Teng & Ors [2008] 1 CLJ 571 FC ***(refd)***
Podar Trading Co Ltd, Bombay v. Francois Tagher, Barcelona [1949] 2 All ER 62 ***(refd)***
Raja Lope & Anor v. Malayan Flour Mills Bhd [2000] 6 CLJ 194 HC ***(refd)***
I *Regina Fur Co Ltd v. Bossom [1958] 2 Lloyd's Rep 425* ***(refd)***
Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v. Balakrishnan Kaliannan [2013] 7 CLJ 413 FC ***(refd)***

Secretary, Irrigation Department, Government of Orissa v. G.C. Roy AIR 1992 SC 732 ***(refd)***
Shamelin Holdings Sdn Bhd v. Mohd Anhar Ahmad [2006] 8 CLJ 622 HC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 FC ***(refd)***
The Government of India v. Cairn Energy India Pty Ltd & Anor [2012] 3 CLJ 423 FC ***(refd)***
United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd [1993] 2 CLJ 31 SC ***(refd)***
Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor [2012] 1 CLJ 448 FC ***(refd)***

Legislation referred to:
Arbitration Act 1952 (since repealed), s. 21
Arbitration Act 2005, ss. 30(1), (5), 33(6), 38, 42
Civil Law Act 1956, s. 11

Arbitration Act 1934 [UK], s. 11
Law Reform (Miscellaneous Provisions) Act 1934 [UK], s. 3

For the plaintiff - Shamsurryaty Shamsuddin; SFC
For the defendant - Ben Chan & Chin Yu Yen; M/s Mah-Kamariyah & Philip Koh

Reported by Sandra Gabriel

JUDGMENT

Lee Swee Seng J:

Introduction

[1] By a written contract PWD203A (Rev 10/83) dated 1 August 2001, the plaintiff had appointed the defendant to construct and complete a project known as "Kompleks Jabatan Laut Wilayah Selatan, di Tg Pelepas, Johor" ("project") upon the terms and conditions stipulated therein for a total contract sum of RM49,990,000 ("contract").

[2] It is not disputed that the works in the project had been satisfactorily completed by the defendant. A Certificate of Practical Completion dated 14 October 2004 was issued by the plaintiff which certified that the whole of the works "were satisfactorily completed on 14 September 2004".

[3] Subsequently, a dispute arose between the parties concerning the defendant's claim against the plaintiff for payment of work done relating to the subsequent topping up of surcharge carried out during the agreed surcharged period and removal upon completion. The claims of the defendant were made under: (1) s. 2: items 2.4.2 and 2.4.3; and (2) s. 3: items 3.1.7 of the Bills of Quantities ("BQ") which formed an integral part of the contract.

[4] The dispute was referred to arbitration under cl. 54 of the contract. On 5 April 2013, Mr Chong Thaw Sing was appointed by the Director of the Kuala Lumpur Regional Centre for Arbitration as the sole arbitrator to adjudicate the dispute. After a full hearing culminating in an award, the learned arbitrator found in favour of the defendant and made the following award:

(i) the plaintiff shall pay the defendant the principal sum of RM1,116,299.27 for outstanding work done, within four weeks from the date of the award. Failing this the defendant is entitled to impose a further interest at a rate of 5% per annum until the sums are paid;

(ii) the plaintiff pays the defendant pre-award interests on the principal sums awarded in the amount RM305,307.85 within four weeks from the date of the award. Failing this the defendant is entitled to impose a further interest at 5% per annum until the sums are paid;

(iii) the plaintiff shall pay the defendant RM25,000 as agreed cost of the reference (party and party cost) within four weeks thereafter; and

(iv) the plaintiff shall bear in full the cost of the award which the learned arbitrator had taxed as RM60,500 and the defendant shall be entitled to immediate recovery of any sum it had earlier advanced towards payment for any part of the cost of the award.

[5] Only para (ii) of the award which deals with the pre-award interest is relevant here.

[6] Pursuant to cl. 55(g) of the contract, it is expressly provided that the award "shall be final and binding on the parties".

Pleadings

[7] The matter relating to interests was expressly referred to arbitration for consideration. At para. 17 of the defendant's statement of case, the claim for the pre-award interest was expressly pleaded and prayed for. At para. 8 of its statement of defence, the plaintiff made a bare denial to the defendant's claim for pre-award interest. In its written submissions, the defendant had expressly submitted and prayed for pre-award interest at para. 134 of the 'claimant's written submission (1)'.

[8] On the other hand, there was no submission by the plaintiff on this crucial issue. The defendant argued that the failure to submit a crucial issue such as this would be fatal to the plaintiff.

Prayer

[9] This is an application by the plaintiff filed under s. 42 of the Arbitration Act 2005 ("AA 2005") to refer the following question of law concerning a final arbitral award dated 10 December 2015 ("award"):

Sama ada Penimbangtara telah terkhilaf dari sisi undang-undang apabila memutuskan bahawa Penimbangtara mempunyai bidang kuasa untuk membenarkan 'pre-award interest'? which being translated reads:

Whether the Arbitrator erred in law in deciding that an Arbitrator has jurisdiction in granting 'pre-award interest'?

Principles

[10] In determining the issue, it was submitted by learned counsel for the defendant that this court will need to review the law governing an arbitrator's power to grant pre-award interest along with the recent decision of the Court of Appeal in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Another Appeal* [2015] 8 CLJ 58; [2015] 4 MLJ 766.

[11] Learned counsel for the defendant, Mr Ben Chan, canvassed the following main grounds in opposing the application:

(i) that part of Court of Appeal's judgment in *Far East Holdings* case stating that the arbitrator did not have power to grant pre-award interest under s. 33(6) of the AA 2005 is distinguishable;

(ii) *Far East Holdings* case, on pre-award interest is *obiter dictum* and wrongly decided;

(iii) the learned arbitrator did not err;

(iv) no intervention even on error of law; and

(v) the plaintiff is not entitled to raise a new point where it had failed to raise and submit in the arbitration proceeding.

[12] On the subject question, the relevant statutory provisions are those contained, *inter alia*, in the AA 2005 and the Civil Law Act 1956. In-so-far as AA 2005 is concerned, ss. 30(1), (5) and 33(6) of the AA 2005 are relevant and they are reproduced here:

30. Law Applicable to Substance of Dispute

(1) Unless otherwise agreed by the parties, in respect of a domestic arbitration where the seat of arbitration is in Malaysia, **the arbitral tribunal shall decide the dispute in accordance with the substantive law of Malaysia**.

(2) to (4) …

(5) the arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement and **shall take into account the usages of the trade applicable to the transaction**. (emphasis added)

33. Form and Contents of Award

(1) to (5) …

(6) Unless otherwise provided in the arbitration agreement, the arbitral tribunal may:

A (a) award **interest** on any sum of money ordered to be paid by the award **from the date of the award to the date of realisation**; and

(b) determine the rate of interest. (emphasis added)

[13] With respect to the Civil Law Act 1956, s. 11 is relevant, where it provides:

B

> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given **interest at such rate as it thinks fit** on the whole or any part of the debt or damages for **the whole or any part of the period between the date when the cause of action arose and**
C **the date of the judgment**: ... (emphasis added)

[14] As submitted by learned counsel for the defendant, there is no doubt that the power to award interest under s. 11 of the Civil Law Act 1956 is conferred upon "the court" and in terms which refer to "proceedings tried in any court". In arbitration proceedings, it is a settled law that the parties'
D submission to arbitration of all their differences is to be construed in the light of the principle of law regulating the payment of interest enshrined in s. 11 of the Civil Law Act 1956. In various cases discussed below, the Malaysian courts had relied on the said s. 11 in empowering an arbitral tribunal the power to grant pre-award interest. Speaking of its rationale, the Federal
E Court in *Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v. Balakrishnan Kaliannan* [2013] 7 CLJ 413; [2013] 6 MLJ 149 held at p. 426 (CLJ); p. 159 (MLJ):

> [26] It is trite law that interest is not a punishment but a compensation for the party entitled to the money for being deprived of its use. ...

F

[15] Mr Ben Chan, for the defendant, argued that it is a well-established law that an arbitrator appointed by parties to adjudicate their dispute under a contract has power to award pre-award interest in the absence of any specific prohibition in the contract to claim such interest. It cannot be over emphasised that "an arbitrator derives this power not from Arbitration Act
G but from the submission to him which necessarily clothes him the implied powers". There is to be implied in the submission an authority in the arbitrator to award interest conformably with s. 11 of the Civil Law Act 1956. An award of an arbitrator is "recognised as binding and be enforced by entry as a judgment" (s. 38 of the AA 2005).

H

The English Position

[16] The defendant's learned counsel referred to the English Court of Appeal's case in *Chandris v. Isbrandtsen-Moller Co Inc* [1950] 2 All ER 618. One of the questions before the Court of Appeal was whether or not interest
I could be awarded by an arbitrator on the amount awarded for demurrage. It was pointed out by the English Court of Appeal that the arbitrator's power to award interest was derived from the submission to him which clothed him

with the power to decide "all matters in difference" according to the existing law of contract, exercising every right and discretionary remedy given to a court of law; ie, s. 3 of the Law Reform (Miscellaneous Provisions) Act 1934 (which is equivalent to s. 11 of our Civil Law Act 1956.) In delivering the leading judgment, Tucker LJ in holding that an arbitrator had such power to award interest, stated at p. 623E-G:

> Counsel for the charterers argued that the judgment was based on the assumption that it was the Civil Procedure Act 1833, which gave the arbitrator his power to award interest, and that, once that Act was repealed, all such powers had gone, and unless the arbitrator had been given fresh powers, he had none. I think, however, that the real basis of *Edwards v. Great Western Ry Co* (1851) 11 CB 588 was that the arbitrator derived his powers, not from the Act of 1833, but from the submission to him which necessarily gave him the "implied powers" referred to in the language of Lord Salvesen which I have just quoted, and I see no reason why, since the Act of 1934, an arbitrator should not be deemed impliedly to have the same powers. Therefore, with diffidence, having regard to the view expressed by the Divisional Court on this matter, I have come to the conclusion that in such a case as the present the arbitrator has power to award interest, and accordingly, to that extent, I think this appeal should succeed and the *Podar* case [*Podar Trading Co Ltd., Bombay v. Francois Tagher, Barcelona* [1949] 2 All ER 62] be overruled.

[17] To appreciate what was overruled better, the reasoning of Lord Goddard CJ in *Podar Trading Co Ltd, Bombay v. Francois Tagher, Barcelona* [1949] 2 All ER 62 is reproduced below at p. 67:

> The Law Reform (Miscellaneous Provisions) Act, 1934, was passed on 25 July 1934, and the Arbitration Act, 1934, was then already law, having been passed on 17 May of that year. The only reference to interest in the latter Act is in s. 11 which provides that:
>
> > A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.
>
> In the Law Reform Act it is provided by s. 3 that:
>
> > (1) In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, [award] interest … on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.
>
> By sub-s (2) of that section the provisions of the Civil Procedure Act, 1833, which deal with interest, namely, ss. 28 and 29, are repealed. So, *although in the Arbitration Act, 1934, a provision is made for interest but only on the amount of the award from the date of the award, s. 3 of the Law Reform Act gives no power to an arbitrator to give interest either on debt or damages. Moreover, as ss. 28 and 29 of the Civil Procedure Act are repealed, we feel driven to hold that not only have arbitrators no power to give interest on damages, but they have been deprived*

> *of the powers which they had so long as the sections of the Civil Procedure Act were in force and can now only give it in circumstances in which it was recoverable at common law*. It may well be that this was overlooked when the Act was passed, but, if it was a *casus omissus* or if the power was taken away *per incuriam*, it must be put right by the legislature. No doubt, the association could amend their rules and provide that interest could be awarded. Then those persons who have made contracts which are subject to the rules and regulations of the association would be bound by an award which gave interest because as a matter of contract they would have agreed to pay if the award was against them. We feel obliged to hold in this case that there was no power to award interest as there is no provision in the rules for it. (emphasis added)

[18] As can be seen our s. 21 of the Arbitration Act 1952 is in *pari materia* with the English s. 11 of their Arbitration Act 1934 and our s. 11 of our Civil Law Act 1956 in *pari materia* with s. 3 of the English Law Reform (Miscellaneous Provisions) Act 1934.

The Australian Position

[19] As highlighted by Mr Ben Chan for the defendant, the question on point was also considered by the Australian High Court in *Government Insurance Office of NSW v. Atkinson-Leighton Joint Venture* [1981] 146 CLR 206. The majority of the High Court of Australia (Stephen, Mason and Murphy JJ) answered the question in the affirmative. Stephen J in his judgment examined very carefully on previous authorities relating to the same point, at pp. 234-5:

> There exists no express grant of power to award interest either in the submission or in the Arbitration Act 1902. The power to award interest which is conferred by s. 94 of the Supreme Court Act 1970 is conferred upon "the Court" and in terms which refer to "proceedings" and to "judgment". The learned primary judge held that, in a case such as the present, agreement was to be implied that the arbitrator might award interest upon the same principles as applied to awards of interest by the Supreme Court. His Honour relied upon *Chandris v. Isbrandtsen-Moller Co Inc* and *Evans v. National Pool Equipment Pty Ltd*. The G.I.O.'s appeal over this issue was dismissed unanimously by the Court of Appeal; Reynolds J.A., with whom Samuels J.A. agreed regarded the authorities as establishing that a term is to be implied in the contract that the arbitrator should decide according to the existing law of contract and should exercise every right and discretionary remedy given to a court of law. Mahoney J.A. was of the same view; such a power may be, he thought, be implied in every arbitration, including those originating in voluntary submission.
>
> *These conclusions accord with what is now a well-established line of modern authority in England, beginning with the overruling of Podar Trading Co Ltd, Bombay v. Francois Tagher, Barcelona by the Court of Appeal in Chandris in 1950. Following Chandris case in London & Overseas Freighters Ltd v. Timber Shipping Co S.A, Edmund Davies L.J. expressed similar views and His Lordship's dissenting judgment*

was upheld on appeal. Of Lord Morris' judgment on that appeal the latest edition of Russell on Arbitration, 19th ed. (1979) p. 356 observes that "it has been recently recognised in the House of Lords that the power includes a discretion as to the amount of interest. …" (emphasis added)

[20] His Lordship, Stephen J concluded at p. 237:

In those circumstances I would affirm the views expressed by the New South Wales Court of Appeal concerning arbitrators' powers regarding the award of interest. Not only is it in conformity with the great weight of authority; that authority appears to me to involve no error of principle. Moreover, it is wholly beneficial in its operation, conferring, as it does, upon arbitrators' power to do justice as between parties to a submission by enabling them to award interest up to the date of the award, upon amounts found due. This is a power the need for which is the greater in times of dear money, reflected in the prevailing high rates of interest. …

[21] In support, Mason J in the same case stated at p. 247:

The parties' submission to arbitration of all their differences is to be construed in the light of the new principle of law regulating the payment of interest enshrined in s. 94. There is to be implied in the submission an authority in the arbitrator to award interest conformably with s. 94 because the Supreme Court is given by the Arbitration Act a supervisory function in relation to an arbitration and because an award of an arbitrator is enforced as if it were a judgment or order of the Court (s. 14).

[22] He further pointed out that the majority decision in *Atkinson-Leighton* was adopted by the subsequent Court of Appeal (NSW) in *IBM Australia Ltd v. National Distribution Services Ltd* (1991) 100 ALR 361 comprising of Kirby P, Clarke and Handley JJA. At p. 375, Clarke JA held:

It is perhaps worth mentioning that since the decision in *Atkinson-Leighton*, the House of Lords in *President of India v. La Pintada Compania Navigacion SA* [1985] 1 AC 104 has held that, by the law of England, where parties agree to arbitration they "impliedly agree that the arbitration is to be conducted in accordance in all respects, with the law of England unless, which seldom occurs, the agreement of reference provides otherwise". It was held that arbitrators had the power to award interest as a court might do under a statute. The judgment of Mason J in *Atkinson-Leighton* was cited with apparent approval.

[23] More recently, Macfarlan JA in *Nassif v. Caminer* [2009] NSWCA 45 (NSW-Court of Appeal) expressed the same view at p. 26, 882:

[42] … Although the legislation does not confer power upon arbitrators to make orders under it, parties may, expressly or impliedly, empower arbitrators to exercise powers analogous to those which would be able to be exercised by the relevant court (see also, as to the power of arbitrators to award interest in circumstance analogous to those in which court would award interest: … *Government Insurance Office of NWS v. Atkinson-Leighton Joint Venture.* …

A **The Position In India**

[24] Mr Ben Chan's initiative and industry took him to India in his survey of cases in the Commonwealth on this point of the powers of an arbitrator to grant pre-award interest. He pointed out that the decisions in *Chandris* and *Atkinson-Leighton* were adopted by Supreme Court of India in *Secretary,* B *Irrigation Department, Government of Orissa v. G.C. Roy* [1992] AIR 732, SC. It adopted the following passage from the *Halsbury's Laws of England*, vol. 2:

> 37. At page 303, para 580 dealing with the award of interest, it reads:
>
> An arbitrator or umpire has power to award interest on the amount C of any debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of award.

[25] The Supreme Court of India in the same case then summarised the legal principles at para. 45:

D > 45. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred to the arbitrator, he shall have the power to award interest *pendente lite*. *This is for the reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and therefore when the parties refer all their disputes* E *- or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award interest*. This does not mean that in every case the arbitrator should necessarily award interest *pendente lite*. It is a matter within his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view. (emphasis added)

F **[26]** Subsequently, another Supreme Court of India in *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. NC Budharaj* [2001] 2 SCC 721 clarified that an arbitrator had jurisdiction to award interest for the pre-reference period in the absence of any specific prohibition in the contract to claim or grant any such interest. Towards the end of His Lordship's G judgment, Doraiswamy Raju J in that case held at pp. 744-5 [25-26]:

> 25. … The submission that the Arbitrator cannot have jurisdiction to award interest for the period prior to the date of his appointment or entering into reference which alone confers him power is too stale and technical to be countenanced in our hands, for the simple reason that in H every case the appointment of an arbitrator or even resort to court to vindicate rights could be only after disputes have cropped up between the parties and continue to subsist unresolved, and that *if the Arbitrator has the power to deal with and decide disputes which cropped up at a point of time and for the period prior to the appointment of an arbitrator, it is beyond comprehension as to why and for what reason and with what justification the arbitrator should be* I *denied only the power to award interest for the pre-reference period when such interest becomes payable* and has to be awarded as an accessory or incidental to the sum awarded as due and payable, taking into account deprivation of the use of such sum award to the person lawfully entitled to the same.

[26] For all the reasons stated above, we answer the reference by holding that the arbitrator appointed with or without intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant such interest. (emphasis added)

The Position In Singapore

[27] The position in Singapore is exemplified by the case of *Ahong Construction (S) Pte Ltd v. United Boulevard Pte Ltd* [1995] 1 SLR 548 (pp. 556 to 557), where Lai Kew Chai J held as follows:

With regard to the specific exercise of awarding interest in arbitration, *it is the law that generally interest should be awarded on a successful claim. An arbitrator who awards a sum of money but fails to award interest to compensate the successful claimant accordingly has prima facie misconducted himself* in the technical sense of the word: *Panchaud Freres SA v. Pagnan and Fratelli* [1974] 1 Lloyd' at p 394. Lord Denning MR (as he then was) said: "*[i]n a commercial transaction if the plaintiff has been out of his money for a period, the usual order is that the defendant should pay interest for the time for which the sum has been outstanding. No exception should be made except for a good reason. An arbitrator may decline to award any interest or award interest at a lower rate or for a shorter period but he must have reasonable grounds for doing so and he should set out these reasonable grounds in his award*". (emphasis added)

The Malaysian Position Prior To *Far East Holdings* Case Under The Arbitration Act 1952

[28] Returning home, *Chandris* was adopted by the Malaysian courts by His Lordship Zakaria Yatim J in *Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd* [1994] 3 CLJ 338; [1994] 2 MLJ 51. Having referred to the above cited passage of Tucker LJ, His Lordship held at p. 340 (CLJ); p. 54 (MLJ) as follows:

According to *Chandris* case, the power of an arbitrator to award interest was *derived from the submission to him which impliedly gave him power to decide all matters of difference according to existing law of contract, exercising every right and discretionary remedy given to a court of law*. The court decided that the arbitrator had the power to award interest.

In the present case, the parties have agreed in the arbitration clause in the contract … that the construction, validity and performance be governed by Malaysian law. *Under s. 11 of the Civil Law Act 1956, the court has the discretionary power to award interest for the recovery of any debt or damages. See Evergrip Prestressing Sdn Bd v. Ken Construction & Trading Sdn Bhd. In my view, the arbitrator in the present case has the same power as that of the court to award interest at such rate as he thinks fit*. Since it was within the discretionary power of the arbitrator to award interest in this case, the court would not interfere with the exercise of his discretionary power. (emphasis added)

[29] The decision in *Lian Hup Manufacturing* was approved by the Court of Appeal in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1; [2006] 1 MLJ 710. It was held at p. 26 (CLJ) pp. 724-5 (MLJ):

> [32] In the first place it is well settled that an arbitrator, in the absence of a specific clause in the agreement, has power to award interest (see *Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd* [1994] 2 MLJ 51; *Executive Engineer v. DN Senapati* AIR 1980 Orissa 74). …

[30] The same conclusion on the power of an arbitrator to grant pre-award interest was reached by Faiza Tamby Chik J in *Raja Lope & Anor v. Malayan Flour Mills Bhd* [2000] 6 CLJ 194; [2000] 6 MLJ 228, p. 238-239 and Raus Sharif J (as the PCA then was) in *Shamelin Holdings Sdn Bhd v. Mohd Anhar Ahmad* [2006] 8 CLJ 622; [2006] 6 MLJ 135, pp. 140-141 and as stated in the Court of Appeal in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1; [2006] 1 MLJ 710.

[31] Section 21 of the AA 1952 does not appear to be materially different from s. 33(6) of the AA 2005. It can be appreciated that the various arguments that may be raised in favour of upholding an award of pre-award interest under the repealed AA 1952 may well be raised in support of the same position and proposition under the AA 2005. The similarity between the AA 1952 under its s. 21 and that of s. 33(6) of the AA 2005 with respect to interest on awards is seen below when placed side by side as follows:

Section 21 AA 1952

> Interest on awards
>
> A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award at the same rate as a judgment debt.

Section 33(6) AA 2005

> Unless otherwise provided in the arbitration agreement, the arbitral tribunal may:
>
> (a) award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realisation; and
>
> (b) determine the rate of interest.

[32] It stands to reason that if an arbitrator's powers to grant pre-award interest stems from the implied reference to him to decide all issue submitted to him for decision, then it does not quite matter if the relevant statute, whether it be under s. 21 of the AA 1952 or s. 33(6) of the AA 2005, does not make reference to pre-award interest. If indeed Parliament had minded to remove the power of an arbitrator to grant pre-award interest when it made provision for post-award interest under s. 33(6) of the AA 2005 then by the same token Parliament must have intended the same when it made a similar

provision under s. 21 of the AA 1952. However, as has been shown from a survey of the Malaysian cases, that was not how the courts have decided so far under the now repealed AA 1952. The arguments upheld by the Court of Appeal in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1; [2006] 1 MLJ 710 must perforce apply with to the current s. 33(6) of the AA 2005 seeing that it is substantially the same as the now repealed s. 21 of the AA 1952.

Whether The Principle Laid Down In *Far East Holdings* Case Is A Mere *Obiter* And Can Be Distinguished

[33] Learned counsel for the plaintiff, Puan Shamsurryaty, submitted that this court, being a High Court, is bound by the decision of the Court of Appeal in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Another Appeal* [2015] 8 CLJ 58 at p. 89; [2015] 4 MLJ 766 at p. 798:

> [98] On the issue of interests, we agree with the learned judge that the Arbitrator has erred in law in awarding pre and post award interests. Having considered the Act, we find that under s. 33(6), the Act has made specific provision for post award interest, but does not provide for pre award interest. *Clearly the Act does not contemplate the awarding of pre award interest. We agree with the submissions by the learned counsel for FEH and KAOP that when the Act specifically provides for post award interest but is silent on pre award interest, then implicitly the Legislature did not intend to confer on an arbitrator the power to award pre award interest*. Therefore we agree with the learned judge that the award of pre award interest ought to be set aside. (emphasis added)

[34] The question referred to the High Court in the *Far East Holdings* case (*supra*) was reproduced by the Court of Appeal as follows in para. 22:

> Whether the arbitrator could in law award pre-award interest and post-award interest when the defendant did not specifically plead for the same in the statement of claim and the plaintiffs object to such award?

[35] Granted the question referred to the High Court is slightly different as follows:

> Whether the Arbitrator erred in law in deciding that an Arbitrator has jurisdiction in granting 'pre-award interest'?

[36] It can be surmised that if post-award interest had been pleaded, the High Court and the Court of Appeal would have no issue affirming its award as s. 33(6) of the Arbitration Act 2005 provides for it, unless the arbitration agreement provided otherwise, which was not so contended there.

[37] It was submitted strenuously by Mr Ben Chan that when comparing the two cases, *Far East Holdings* has these two distinguishing features namely:

A (i) when the claimant did not specifically plead for interests in the statement of claim; and

(ii) the respondent had objected to the award of interests.

[38] The lynchpin of his submission was that what was held by the Court B of Appeal there in the *Far East Holdings* case (*supra*) was a mere *obiter* and not the *ratio* of the case where the power of an arbitrator to award pre-award interests in concerned.

[39] The Court of Appeal had in *Far East Holdings* case (*supra*) set out the argument on interest before the arbitrator as follows at pp. 86-87:

C Interests

[87] The arbitrator was urged by learned counsel for MUIP to award interests, even though no interest was pleaded, on the ground that MUIP had been deprived of the extra dividends it would have received had it been permitted to exercise both options, and for the loss of dividends D suffered by MUIP due to the additional allotment of 22,096,868 shares to FEH. It was also submitted that pre award interest could be awarded under s. 74(1) and (2) of the Contracts Act 1950. FEH and KAOP on the other hand had submitted that no interest should be awarded because MUIP had not pleaded for interest and the facts on the claim for interest were not pleaded. It was further submitted that based on s. 33(6) of the E Act, the arbitrator has no power to award pre award interest. Additionally, FEH and KAOP contended interest is 'haram' in 'hukum syarak'.

[89] The arbitrator is of the view that his jurisdiction to award pre award interest is based on the common law position and s. 11 of the Civil Law Act 1956 which confers a discretion on the court to award pre judgment F interest. Section 11 of the Civil Law Act 1956 states as follows:

Power of Courts to award interest on debts and damages.

In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such G rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section:

H shall authorise the giving of interest upon interest;

shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

shall affect the damages recoverable for the I dishonour of a bill of exchange.

[90] Having considered the case authorities and the submissions made, the arbitrator awarded MUIP pre award interest at 4% pa. Based on s. 33(6) of the Act, the arbitrator awarded post award interest also at 4% pa.

[40] With respect to post-award interest, the Court of Appeal affirmed the decision of the High Court in setting aside the post-award interest on the ground that it was not pleaded as can be seen below:

> [99] With regard to post award interest, it is not disputed that MUIP had not pleaded for such interest either in the statement of claim or in the originating summons filed at the High Court. We are of the view that in the absence of any prayer for interest, which learned counsel for MUIP must be taken to be aware of, the arbitrator ought not to have awarded post award interest. We agree with the submissions by learned counsel for FEH and KAOP that parties must be bound by their pleadings. The learned judge is correct in setting aside the post award interest.

[41] I am not unaware of the Federal Court's *dicta* in *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448; [2011] 5 MLJ 465, where, having considered several dictionary meanings on *obiter dictum* held at p. 494E-F (CLJ); p. 502E-F (MLJ):

> [76] … The term *obiter dictum* in Latin means remarks or comments in passing. These remarks or comments are judicial observation and are not binding. In other words, they are remarks or comments made by judge in a decision that do not form part of the legal reasoning in reaching the decision. …

[42] It was also argued that the Federal Court in *Lim Eng Chuan Sdn Bhd v. United Malayan Banking Corporation & Anor* [2013] 5 CLJ 425; [2013] 3 MLJ 161 had refused to followed its earlier decision in *Kimlin Housing Development Sdn Bhd v. Bank Bumiputra Malaysia Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805 on the ground that the relevant part of the decision in *Kimlin* was merely *obiter dictum*.

[43] In *Kimlin*, the question posed concerned the power of sale by a Receiver and Manager ("R&M") appointed under a debenture in respect of a charged land under the National Land Code. However, the (then) Supreme Court went on to hold at p. 297 (CLJ); p. 823 (MLJ) that:

> … no power of sale can be conferred by way of a debenture **or power of attorney or otherwise**, but proceedings must be brought by the charge to obtain a judicial sale in accordance with the rigid procedure laid down in the Code … (emphasis added)

[44] On the other hand, in *Lim Eng Chuan Sdn Bhd*, the question posed was the power of sale by an attorney appointed pursuant to a power of attorney ("PA") clause in the debenture. The Federal Court held at p. 437C-D (CLJ); p. 169F-G (MLJ):

> We agree with the majority in the Court of Appeal that the other part of the judgment in *Kimli*n which referred to 'power of attorney or otherwise' and 'power of attorney' is at best, only *obiter dictum*, *albeit* when the questions posed there concerned only the R&M, since the debenture did not contain a PA clause.

[45] Applying legal principles above, Mr Ben Chan argued that that part of the judgment in *Far East Holdings* (*supra*) commenting on s. 33(6) of the AA 2005, is at best, only *obiter dictum* and not binding. The question posed there concerned where the claim for interests was not specifically pleaded and was objected to by the opponent, which is unlike here.

[46] However, on the point of pre-award interest, the Court of Appeal did not decide on the point of pleading, or rather the absence of it. Instead, the Court of Appeal dealt with the issue of the jurisdiction of the arbitrator to grant pre-award interest. In other words, even if there had been pleaded pre-award interest, the arbitrator could not have granted it. The Court of Appeal was of course, at liberty, to decide the question posed from the underlying perspective of the undergirding power of an arbitrator to award pre-award interest. The reasoning of the Court of Appeal is as follows at p. 89 (CLJ); pp. 788-789 (MLJ):

> [98] On the issue of interests, we agree with the learned judge that the Arbitrator has erred in law in awarding pre and post award interests. Having considered the Act, *we find that under s. 33(6), the Act has made specific provision for post award interest, but does not provide for pre award interest. Clearly the Act does not contemplate the awarding of pre award interest. We agree with the submissions by learned counsel for FEH and KAOP that when the Act specifically provides for post award interest but is silent on pre award interest, then implicitly the Legislature did not intend to confer on an arbitrator the power to award pre award interest*. Therefore we agree with the learned judge that the award of pre award interest ought to be set aside. (emphasis added)

[47] However, as the basis for the Court of Appeal holding that the arbitrator ought not to have awarded pre-award interest stems from a lack of power of the arbitrator to do so in law, it would be difficult if not impossible to argue that the said decision is a mere *obiter dicta*. It is very much the *ratio* of the case where pre-award interest is concerned, being the answer to a specific question raised in a reference under s. 42 of the Arbitration Act 2005 which substantially affects the rights of the parties to the arbitration.

[48] If the issue is that of the far greater matter of a lack of power on the part of an arbitrator to award pre-award interest, then it does not quite matter even if the issue was not submitted upon by the respondent (the plaintiff here) in the arbitration proceedings or that it was not pleaded. In the present case the claimant had specifically pleaded for both pre-award and post-award interests.

[49] Learned counsel for the claimant was anxious about the fact that if *Far East Holdings* case (*supra*) is understood to have laid down the law that an arbitrator has no power to award pre-award interest, that will put Malaysia out of alignment and inconsistent with the modern general law adopted by other Commonwealth countries on the subject under

consideration. He argued with considerable concern that it would definitely not be a good move and would infringe the good judicial policy that there should be uniformity in the common law of the Commonwealth to provide for consistency *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31; [1993] 1 MLJ 182, 193H-I, SC.

[50] Recently the Federal Court was asked to restate the law with respect to the standard of proof in civil fraud. The Federal Court spoke of the need to realign our law with that of other Commonwealth countries. His Lordship Richard Malanjum CJSS opined in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1 as follows:

> [47] In view of the positions of the law in the respective common law jurisdictions as summarised above, we agree with both learned counsel for the parties in this appeal that the position of the law on the standard of proof for fraud in civil claims in this country is far from satisfactory. With respect, there is merit in the submission of learned counsel for the defendant that the adoption of the criminal standard of proof for fraud in civil claims is due to the misinterpretation or even a blind adoption of the judgment of Lord Atkin in *Narayanan Chettyar v. Official Assignee of the High Court, Rangoon*.
>
> [48] As such, in our judgment the time has come to realign the position of the law in this country on the standard of proof for fraud in civil claims. While learned counsel for the defendant seemed to favour the adoption of the Singapore position, learned counsel for the plaintiff urged us to adopt the principle in *In re B (Children)*.
>
> [49] With respect, we are inclined to agree with learned counsel for the plaintiff that the correct principle to apply is as explained in *In re B (Children)*. It is this: that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And '(N) either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts'.

[51] A far more persuasive argument would be that Malaysia would be out of sync with other countries that apply the UNCITRAL Model Law, and more so with respect to International Arbitration. As stated in the explanatory note to the Arbitration Bill 2005, one of the avowed aims of the legislation is to encourage international uniformity in the arbitration regime under the UNCITRAL Model Law dated 21 June 1985.

[52] Jurisdictions in England, Australia, India and Singapore allow an arbitral tribunal to award pre-award interest as they have understood that the arbitral tribunal derives its powers not from the arbitration legislation but from the submission to the tribunal which clothed the tribunal with the implied powers to award interest. It follows that if the particular arbitration

statute is not the source of the arbitral tribunal's power to award interest, then it does not quite matter if the arbitration statute is silent on pre-award interest for so long as it does not prohibit the award of pre-award interest. The award of pre-award interest would also fall within "usages of the trade applicable to the transaction" as envisages under s. 30(5) of the Arbitration Act 2005. It would not be presumptuous to postulate that the attractiveness of having Malaysia as the seat of arbitration would suffer if there can be no award of pre-award interest in a dispute that comes before it for arbitration.

[53] Mr Ben Chan then made the valiant argument that the decision of the Court of Appeal was made *per incuriam*. This court must resist every temptation to go down that road of judicial indiscretion. Based on established principles of *stare decisis*, it is not for this court to say that a higher court has decided a matter *per incuriam*. Both judicial decorum and discipline would require this court to follow the *ratio* laid down by a higher court as in the Court of Appeal here. I need to go no further than the quote the *dicta* of His Lordship Edgar Joseph Jr FCJ in *The Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd* [1997] 3 CLJ 365 at pp. 372-374; [1997] 2 MLJ 829 at pp. 835-837 as follows:

> In the first place, we should like to deal with a point of wide ranging importance and this concerns the principle of *stare decisis*, which is a cornerstone of our system of jurisprudence.
>
> In *Harta Empat*, the Court of Appeal in effect held that *Feyen* was not binding on it because it had overlooked certain provisions of the Code, *to wit*, ss. 241(3) and 301(c). It was on the basis of this that the Court of Appeal relegated *Feyen* to mere *obiter dicta*. It is elementary that where, for example, a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court, the decision will have been given *per incuriam* (see the third exception, per Lord Green MR in *Young v. Bristol Aeroplane Co Ltd* [1944] 1 KB 718). On the other hand, *obiter dictum* is a mere chance remark by the court and is used in contradistinction to *ratio decidendi* - the rule of law for which a case is authority. Clearly, the Court of Appeal meant to say that our decision in *Feyen* was given *per incuriam*.
>
> The question therefore arises: *is it open to an intermediate court of appeal, such as the Court of Appeal in this country, to disregard a judgment of a final court of appeal such as the Federal Court on the ground that it was given per incuriam?*
>
> Our task in answering this question has been made considerably easier by the assistance derived from the remarks of Lord Hailsham in *Cassell & Co Ltd v. Broome & Anor* [1972] AC 1027, which indicated the reaction of the House of Lords to the Court of Appeal's refusal to follow a previous decision of the House on the ground that it had been given *per incuriam*.
>
> Touching on the repercussions of the Court of Appeal advising judges of first instance to ignore decisions of the House of Lords, Lord Hailsham said this (at p 1054B-D):

> I am driven to the conclusion that when the Court of Appeal described the decision in *Rookes v. Barnard* as decided '*per incuriam*' or 'unworkable', they really only meant that they did not agree with it. But, in my view, even if this were not so, it is not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way and, if it were open to the Court of Appeal to do so, it would be highly undesirable. The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lord Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords and in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.

And in a famous passage (at p. 1054D-E), Lord Hailsham concluded this part of the case by saying:

> *The fact is, and I hope that it will never be necessary to say so again, that in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers*. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co Ltd* [1944] 1 KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.

In our view, every word of what Lord Hailsham said regarding the status of judgments and relevance of precedent in the House of Lords, the circumstances, the duty of the Court of Appeal to accept loyally the decisions of the House of Lords and the chaotic consequences which would follow should the Court of Appeal fail in this duty apply with full force, *mutatis mutandis*, to this country and we adopt what His Lordship said. Clearly, the Court of Appeal in *Harta Empat* flew in the face of the principles enunciated by Lord Hailsham and we can only express the hope that it will not be necessary for the Federal Court hereafter to have to remind the Court of Appeal of those principles. (emphasis added)

[54] What is spoken of as applying to the Court of Appeal *vis-a-vis* a Federal Court's decision applies with equal force to the High Court *vis-a-vis* a Court of Appeal's decision.

A **Whether Parliament Is Presumed To Know The Law On Pre-award Interest In An Arbitration Before The Enactment Of The Arbitration Act 2005**

[55] The defendant submitted that Parliament is presumed to know the law at any time it exercises its legislative authority upon a subject. See *Luggage* B *Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, 754, CA. In the present context, the Parliament is presumed to have known the general law relating to the arbitrator's power and the jurisdiction to grant pre-award interest when enacting the AA 2005.

C **[56]** I agree that it is a well-established principle of statutory interpretation that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion. The Federal Court in *Malayan Banking Bhd v. Chairman Sarawak Housing Developers' Association* [2014] 6 CLJ 409; [2014] 5 MLJ 169 held at p. 418 (CLJ); p. 178 (MLJ):

D

> [23] If the Act wishes to take away that right, words must be used that point unmistakably to that conclusion (*National Assistance Board v. Wilkinson* [1952] 2 QB 648). Devlin J in clear terms said:
>
> > It is a well-established principle construction that a statute is not E to be taken to effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion … It is another principle of statutory interpretation that the court leans against an interpretation which produces unjust and arbitrary consequences.

F **[57]** It is clear that nowhere in s. 33(6) nor in any part of the AA 2005 has Parliament taken away the general law on the arbitrator's power and jurisdiction to award pre-award interest. On the contrary, s. 33(6) of the AA 2005 confines itself merely to post-award interest and the arbitrator's discretion in determining the rate. By applying the well-established canon of statutory interpretation, when the Legislature exercised its legislative G authority on the AA 2005, it must have intended not to effect a fundamental alteration of that general law that an arbitrator has power and jurisdiction to award pre-award interest.

[58] Moreover s. 30(1) of the AA 2005 mandated that the arbitral tribunal "shall decide the dispute in accordance with the substantive law of H Malaysia". Section 11 of the Civil Law Act 1956 is one such substantive law that the arbitral tribunal must have in mind.

Whether The Awarding Of Pre-award Interest Is An Error Of Law That Justify The Intervention Of This Court

I **[59]** It may safely be argued, as the defendant here did, that when the parties submitted the dispute to the learned arbitrator for consideration, there was an implied term in the submission that the learned arbitrator should have

the power to award, *inter alia*, pre-award interest as would be available in a court of law under s. 11 of the Civil Law Act 1956. It is also settled law that when parties entered into a contract they must be deemed to have contracted in the knowledge of general law (*Bishop v. Bonham* [1988] 1 WLR 742, 750H). When the parties entered into the contract in the present case, they must be deemed to have done so in the knowledge of the general law that the learned arbitrator has the power to make pre-award interest. The defendant then concluded that it is highly unconscionable and inequitable for the plaintiff in attempting to alter the score at the end of the game unilaterally.

[60] The defendant further contended that the objection by the plaintiff on the pre-award interest could have been avoided by the plaintiff by incorporating a suitable term into the contract, which it had failed. It could have been done so easily because the plaintiff was the sole author of the contract. In effect, what the plaintiff attempted to do now is to ask the court to re-write the parties' contract by incorporating a term which is not in existence. The fundamental principle is that a court cannot re-write the parties' agreement; *Ong Thye Peng v. Loo Choo Teng & Ors* [2008] 1 CLJ 571, 594D-F, FC.

[61] The defendant had with considerable persuasion, positioned its argument in this fashion; "The matter relating to the claim of interest was expressly referred to the learned arbitrator for consideration. It is a well-established law that when parties refer a matter expressly to the arbitrator for consideration and to the extent that he makes an error of law, the parties must take the consequences".

[62] As authority for that legal proposition, it is sufficient to quote the following passage from the decision of the Federal Court in *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423, 448; [2011] 6 MLJ 441, 462:

> [53] And as Scrutton LJ put it '… if you refer a matter expressly to the arbitrator and he makes an error of law you must take the consequences; you have gone to an arbitrator and if the arbitrator whom you choose makes a mistake in law that is your look-out for choosing the wrong arbitrator; if you choose to go to Caesar you must take Caesars's judgment' (see *African & Eastern (Malaya) Ltd v. White, Palmer & Co Ltd* (1930) 36 LI L REP 113; cited with approval by the Court of Appeal in *Dato' Teong Teck Kim & Ors v. Dato' Teong Teck Leng* [1996] 1 MLJ 178 … (at p 452).

[63] Granted the court is always guarded to prevent an application filed with 'reference on question of law' under s. 42 of the AA 2005 from turning into a wholesale 'appeal' against the arbitral tribunal's decision. More recently, the Court of Appeal in *Chain Cycle Sdn Bhd v. Kerajaan Malaysia* [2016] 1 CLJ 218; [2016] 1 MLJ 681 held at p. 233 (CLJ); p. 699D-G (MLJ):

A

> [32] In our considered view such a restriction or limitation as afforded by the *Absalom* exception, was still necessary and relevant even in a s. 42 of the AA scenario as well. This was so in order that the 'reference on question of law' under that provision was not turned into a wholesale 'appeal' against the arbitral tribunal's decision or ruling. The court had to guard that the proceedings brought to court related to arbitrations, especially post-award, were not in substance and effect an appeal or a re-hearing, or like here, providing an opportunity for regurgitation of the competing arguments on that specific issue of law that had by agreement of the parties been chosen and referred to the arbitral tribunal for determination conclusively. The fact that the arbitrator took one approach in interpretation over the other could not be a cause for further complaint in a reference proceedings under s. 42 of the AA too. To allow the appellant to re-litigate this issue would have the effect of opening the floodgates to allow what was in substance an appeal couched as a question of law.

B

C

D

[64] However, as has been highlighted earlier, the Court of Appeal in *Far East Holdings* case (*supra*) had decided that an arbitrator lacks the power and so the jurisdiction to grant pre-award interests. It is a pronouncement of the law that goes to the very root and core of the arbitrator's powers. In as much as the Court of Appeal affirmed the decision of the High Court to intervene and set aside the pre-award interest there, this High Court would so allow it here.

E

[65] It was also ably argued for the defendant that the issue was raised for the first time by the plaintiff in this application. It was submitted that the plaintiff is not entitled to do so.

F

[66] As noted above, in the statement of defence, the plaintiff merely made a bare denial on the claim for interests. It is well established that the danger of this kind of general denial defence is that once the plaintiff takes that course, it must stand or fall on its pleaded defence. It is not permissible for the plaintiff to proceed to put forward some affirmative case which they have not pleaded or alleged; *Regina Fur Co Ltd v. Bossom* [1958] 2 Lloyd's Rep 425, 428 per Lord Evershed M.R.; adopted in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v. Capital Insurance Bhd* [2004] 1 CLJ 357; [2004] 1 MLJ 353, 365[19], CA.

G

[67] Lord Brightman in delivering the decision of the Privy Council case in *AR PL Palaniappa Chettiar v. Lakshamanan Chettiar* [1983] 1 LNS 178; [1983] 2 MLJ 177 held at p. 180:

H

> The submissions were exchanged before being delivered to the trial judge. If a submission referred to a matter of record which the other party asserted he was entitled to exclude from the judge's consideration, the time to take that objection and to seek a ruling upon it was when the submissions been delivered. If a party considered that a matter of record, such as the findings in the Indian Action, was inadequately or inaccurately

I

set out, **the objection should have been taken before the judge was asked to consider the case and adjudicate upon it, and not after he had reached his decision**. (emphasis added)

[68] In the English Court of Appeal in *Fidelitas Shipping Co, Ltd v. V/O Exportchleb* [1965] 2 All ER 4, Lord Denning MR held at p. 9:

> **... And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour**. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. *If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings*. (emphasis added)

[69] Diplock LJ, in the same case, held at p. 10:

> Issue estoppel applies to arbitration as it does to litigation. The parties having chosen the tribunal to determine the disputes between them as to their legal rights and duties are bound by the determination by that tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal.

[70] All the above submissions of the defendant would have been spot on had it not been for the fact that the reference of a question of law here deals with something more fundamental. It is this; the lack of power and jurisdiction of the arbitrator to grant pre-award interest.

Pronouncement

[71] My hands are tied though I can appreciate the cogency of the legal arguments in favour of an arbitrator granting pre-award interests. Another panel of the Court of Appeal will have the opportunity to hear the arguments again or perhaps the Federal Court might be hearing the appeal sooner from the decision of *Far East Holdings* (*supra*), as a question of law that was allowed during the leave application granted by the Federal Court on 28 March 2016 was as follows, "Whether under or in proceedings under the Arbitration Act 2005, the arbitrator has jurisdiction to award pre-award interest?"

[72] In the circumstance I was constrained to set aside only the award of pre-award interest of RM305,307.85. Each party shall bear its own costs.